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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 532

In re GEORGE ANASTAPLO,

Appellant

On Appeal from The Supreme Court of Illinois

APPELLANT'S PETITION FOR REHEARING.

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In re GEORGE ANASTAPLO,

Appellant

On Appeal from The Supreme Court of Illinois

APPELLANT'S PETITION FOR REHEARING.

Appellant, George Anastaplo, submits this Petition in support of the request that this Court grant rehearing of its order of February 28, 1955,[1] dismissing the appeal and denying the petition for writ of certiorari, and that probable jurisdiction be noted or a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in this case[2] as has been requested in the Jurisdictional Statement filed in this Court January 10, 1955.

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[1] "**Per Curiam:** The appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. Mr. Justice Black and Mr. Justice Douglas dissent."

[2] **In re George Anastaplo,** 3 Ill. 2d 471, 121 N.E. 2d 826 (September 23, 1954). The variation (significant in terms of the doctrine of **Wieman v. Updegraff,** 344 U.S. 183) between the advance sheet text of the Illinois Reporter and the text of the Northeastern Reporter, which was pointed out in the note at page i of the Jurisdictional Statement, can now be seen in the bound volumes. The original version is to be found in 121 N.E. 2d at 828; the later modified version, in 3 Ill. 2d at 474.

REASONS FOR GRANTING REHEARING AND REVIEWING THE CASE ON ITS MERITS.

Appellant has received with regret the announcement that this Court will not review the action of the Illinois authorities denying him admission to the bar. This regret comes not so much from dissatisfaction with the lot destined to be his as from the realization that matters may have to become even worse for the bar before they can become better—before, that is, a position such as appellant's is accepted as contributing to an independent and responsible bar. Appellant is obliged to speak once more on the issues of this matter, in the hope that this Court may reverse a decision that can bring the profession nothing but harm.[3]

1. The increasingly apparent significance of the First Amendment.

Appellant has alleged repeatedly in the last five years that but for the expression of his opinions as to the right of revolution he would have become a member of the Illinois bar on November 29, 1950. (R. 4, 22) The facts upon which this allegation rests are evident throughout the Rec-

[3] Rule 58(2) seems to apply only to petitions for rehearing of orders on petitions for writ of certiorari. The "intervening circumstances of substantial . . . effect" there referred to are set forth below at pages 6-8, where the recent development with respect to the Fifth Amendment is considered, and even to some extent at pages 2-5, where the increasingly apparent significance of the First Amendment is pointed up.

Rule 58(1), on the other hand, would seem to apply to petitions for rehearing of orders respecting appeals. Clarification of certain arguments would seem appropriate in this connection to indicate the substantiality of the federal questions involved here. **Cf.** Stern and Gressman, **Supreme Court Practice** (1954), p. 355.

ord. (R. 105-6) The allegation itself was developed in his brief submitted to the court below in September 1953 (pp. 26-37, 38-43, 80-81) as well as in the Jurisdictional Statement filed in this Court earlier this term (pp. 26-27).

To allege is not, of course, to prove. But to allege repeatedly, over a period of five years, and to show clearly how the Record supports the allegation should suggest that there might be something worth looking into about an allegation against which no challenge has been raised to this day. The character committee, in its report, dismissed this allegation in such a way as to add more force to it (R. 364-5); the court below, in its opinion, avoided it by rearranging the sequence of the facts (Jurisdictional Statement, p. 12); and, of course, there has been filed no reply at all to appellant's Jurisdictional Statement. It is difficult to see what else appellant can do to establish the facts that he alleges in addition to indicating clearly both the extent to which his view is supported by the facts and the lengths to which the Illinois authorities have gone in avoiding the issues.

It seems ever more certain that no charge is or ever will be made with respect to appellant's affiliations or associations and that no doubts exist as to appellant's character and fitness for the practice of law. We venture to predict that fewer and fewer members of the character committee will deceive themselves that this case turns upon the question of "Communism."[4] Rather, it should become

[4] It cannot be stressed too much that membership in the Communist Party (or in the Ku Klux Klan) is not an issue in this case, but only the effect of a refusal to answer questions about such membership (and other similar questions) when there is no allegation or evidence of membership, when the questions occur only after long periods of badgering about philosophical and political views, particularly views about the right of revolution, and when silence is couched in the form of a refusal to submit to some-

increasingly apparent to what extent the Illinois authorities have been saddled with a position which they will find even harder to justify than they do now. The willing-

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thing deemed by appellant to be in the nature of a test oath and to be improper and unconstitutional inquiry.

The proverbial complaint that lawyers often fail to appreciate what is apparent to everyone else is supported by the circumstances of this case. Appropriate in this connection is an article in appellant's home town newspaper, an excerpt from which follows:

> "Anastaplo . . . took the grounds that the Bar Association of Illinois had no right to ask him if he were a Communist or member of the Ku Klux Klan. He has subscribed to the oath willingly to support the constitution. . . . Those who know George . . . think . . . that he feels they have no right to ask such questions, and rather than answer, would argue until the sun goes down. . . . If George should win in his point of constitutional law that no one has the right to ask such questions, he will have made quite a reputation as a constitutional lawyer. If he loses, it will be other than the field of law for him." [The Carterville (Illinois) **Herald,** October 1, 1954.]

The nature of the sentiments expressed in this and other parts of the article suggests why the character committee has suppressed the report made by an Investigator sent to appellant's home town on at least two occasions. (See Note 5, Jurisdictional Statement) With this report in the Record it would have been even harder than it is now for the Illinois authorities to demonstrate that their decision was the result of appellant's refusal to answer certain questions about affiliations rather than the result of the character committee allowing itself to become excited and hostile toward appellant's essentially conservative opinions and philosophical position. It remains to be seen how many more such unrealistic justifications the Illinois Supreme Court will be obliged to underwrite for the sake of commissioners who have earned **some** consideration from that court for their usually tedious and often unrewarding work as members of the character committee.

Perhaps all appellant can hope to accomplish at this time is to distinguish the real issues from the unrealistic. Lest it be feared that no "practical" lawyer would appreciate appellant's distinctions, reference is made to **The Works of James Wilson** (1896 ed.), Vol. I, pp. 14-15, 18, as well as to "The Strange Case of Sir William Fox," 24 N.Z.L.J. 231 (1948).

ness of the Illinois authorities to ignore or evade the issues that have been raised here reflects the tone of arbitrariness found in this case from its beginning. The issues avoided, on the other hand, suggest the extent to which rights under the First and Fourteenth Amendments have been infringed.

Thus, it can now be unequivocally stated that, as the record stands (supplemented as it is by these unchallenged allegations and analyses), appellant has been denied admission primarily because of his defense of the principle of the right of revolution as that principle is expressed in The Declaration of Independence. Or, to put it more generally, he has been excluded from the practice of law because he expressed upon request certain supposedly unorthodox opinions.

2. The probable rationale of this Court in denying review.

One must hope, of course, that this Court does not approve of exclusions from the bar on the ground attributed here to the Illinois authorities. But another rationale for this Court's action is not so easily found if one recalls that review was granted in cases such as *In re Summers*, 325 U.S. 561, and *Application of Levy*, 23 Law Week 3142, to say nothing of *Barsky* v. *Board of Regents*, 347 U.S. 442, and *Wieman* v. *Updegraff*, 344 U.S. 183. And one can assume that the Illinois authorities would have been quick to point out any technical defects in appellant's papers that might have been responsible for this Court's decision. If then, there is an explanation for this Court's action here, aside from one suggesting a deliberate acquiescence in a drastic abridgment of freedom of speech, it must lie in an overall policy of leaving problems relating to the "loyalty" aspects of bar admission proceedings to the discretion and control of state courts and local bar associations.

No doubt, we would have seen a more realistic statement on the part of the Illinois authorities if it had been assumed beforehand that this Court would not exercise its paramount jurisdiction or assume its ultimate responsibility. It is apparent that both the character committee report and the opinion of the court below were set down with a view to retrieving what had been lost through uninhibited expressions and conduct on the part of committee members at the hearings. Paradoxically, a more realistic statement on the part of the Illinois authorities of the principles upon which the character committee acted, and which the court below was misled to endorse, might have startled this Court into action. But, it is suggested, this Court should not rely only upon the statement of the Illinois authorities in evaluating this case: for an examination of the Record makes it clear that the character committee has been far from willing to face up to what it has done.[5]

3. New light from the Fifth Amendment.

In addition to clarifying certain freedom of speech considerations, we should like at this time to urge more strongly a line of thought referred to in Note 25 of the Jurisdictional Statement where the Fifth Amendment is discussed. Although that amendment is not basic in this matter, a curious development in recent months may have some bearing here. This development, which has seen the Fifth Amendment recognized as a symbol worthy of powerful support in our society, is epitomized by the recent publication of Dean Griswold's book, *The Fifth Amendment Today*. Here that amendment is praised as "a sym-

[5] Reference is here made to London, "Heresy and the Illinois Bar: The Application of George Anastaplo for Admission," 12 Lawyers Guild Review 163 (1952), where there is available a substantial part of the Record in an easily readable form.

bol of the ultimate moral sense of the community, upholding the best in us, when otherwise there [is] a good deal of wavering under the pressures of the times.'"[6]

Thus, it would seem, the value of that amendment is becoming more widely recognized, perhaps even with respect to situations where professional competence is being evaluated. The considerations which are now becoming apparent as appropriate to the Fifth Amendment should, it is urged, be at least as appropriate in a situation where a position of resistance against usurping governmental authority is symbolized by reference to the First Amendment. Thus, in the present case, the First and Fourteenth Amendments are relied on to challenge both inquiries and any unfavorable effect of a refusal to answer inquiries about opinions and affiliations when the agency inquiring has no evidence whatever of its own, and has not claimed to have any evidence of its own, that the one questioned has the opinions or affiliations about which he is asked. It is when invoked in precisely such situations that the Fifth Amendment or any corresponding state constitutional provision has the most persuasive force.

An applicant who has prepared himself for practice is not in such a different position from a member of the bar, under the doctrine of "unconstitutional conditions,"[7] as is sometimes supposed. If a member of the bar may not be disciplined under state law for claiming his privilege

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[6] P. 73. The speech from which this quotation is taken evidently did not appear in print until after appellant had filed his Jurisdictional Statement in this Court.

[7] See Henderson, **The Position of Foreign Corporations in American Constitutional Law,** C. VIII, "The Doctrine of Unconstitutional Conditions" (1918). See also, Jurisdictional Statement, pp. 35-37.

when asked about ordinary crimes or unethical practices,[8] this circumstance has some bearing, by analogy, on a claim under the First and Fourteenth Amendments to be free from questions about opinions and affiliations put by an agency which does not claim to have any evidence whatever to serve as a basis for its questions. If the Fifth Amendment is becoming "a symbol of the ultimate moral sense of the community," surely there is much to be said along the same line for that combination of the First and Fourteenth Amendments relied on here. For the First Amendment, now enlarged in its effects by the Fourteenth Amendment, may well be, as has been said, "the most significant political statement which we Americans have made."[9]

4. What can be done?

We should like to emphasize our earlier argument that the unwisdom of the action of the court below should also be considered by this Court as within its constitutional powers to evaluate and correct. (Jurisdictional Statement, pages 39-40) It is the purpose of this Petition, as a first step toward such correction, to secure a reversal of the decision dismissing this appeal.

We are proceeding at this time, furthermore—while the circumstances of the matter are fresh in this Court's mind

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[8] See Brown, "Lawyers and the Fifth Amendment: A Dissent," 40 A.B.A.J. 404 (May 1954). See also, Kalven, "Invoking the Fifth Amendment—Some Legal and Impractical Considerations," 9 Bulletin of the Atomic Scientists 181 (June 1953). **Cf.** Meltzer, "Invoking the Fifth Amendment—A Rejoinder", 9 Bulletin of the Atomic Scientists 185 (June 1953).

[9] Meiklejohn, "What Does The First Amendment Mean?" 20 Univ. Chi. L. Rev. at 461 (Spring 1953). **Cf.** Meiklejohn, **Free Speech and Its Relation to Self-Government** (1948), 37-40.

—to submit independently of this Petition a motion designed to invoke additional action which this Court could take to correct, in part, the situation as it now stands. This is the Motion for Leave to File an Application for Admission to the Bar of the Supreme Court of the United States which appellant submits at the same time as this petition and which is discussed in the margin and printed for the convenience of this Court in the Appendix to this Rehearing Petition.[10] The Motion is related to the Illinois decision (and this Petition) to the extent that that decision leaves appellant technically ineligible for admission to the bar of this Court, even though he may be fully

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[10] The granting of such leave, it is suggested, would not only provide some protection for this Court against arbitrary selection by state courts of prospective applicants for the Bar of this Court but would also serve, in effect, to protect some of appellant's rights. (Jurisdictional Statement, pp. 39-40) In addition, the granting of such leave might tend to influence state courts and local bar associations for the better in these matters. Particularly would this action be appropriate, it is suggested, if the denial of review in this matter rested and continues to rest not on any judgment as to the merits of appellant's cause but rather on a self-limiting policy on the part of this Court with respect to federal-state relationships. Experimentation, we further suggest, should not be the exclusive province of the states in these matters.

In this way, furthermore, appellant can attempt to make a lawyer's contribution to the administration of justice. For if this Court does not reverse its decision dismissing his appeal, it seems that he will have no opportunity to make further contributions as an Illinois attorney, under present circumstances, unless the Illinois authorities should on their own motion see fit to call him to the bar as one obviously qualified to serve. **Cf.** Gale, "Myra Bradwell, The First Woman Lawyer," 39 A.B.A.J. at 1080 (1953).

equipped to serve in that capacity.[11] It would seem particularly appropriate to grant the requested leave in a situation where it might otherwise appear that this Court is not disturbed that a spirited and persistent defense of The Declaration of Independence has cut short a career at the bar.

5. A parting of the ways.

Appellant may have long ago made the mistake of assuming that the character committee sought straightforward answers to its questions as well as relevant arguments in support of such answers. (R. 15) And so he argued, in good faith and with some care, about the eligibility of Communists to practice law and about the "right of revolution." (R. 105-6) He has attempted to proceed in the same manner in the various documents that have come out of this case. Perhaps, as we have said, this was a mistake. But if it is a mistake that can be construed as in any way disqualifying him for the practice of law, then it may be just as well that events have taken the course they have early in his career.

For appellant cannot see, if ideas such as his mark one for proscription, how he could have avoided trouble indefinitely. The character committee, for instance, not only sees something "suspicious" in the doctrine of "rightful rebellion" but would even cede to the Communist Party

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[11] Problems relating to appellant's character and fitness to serve as a member of the Bar of this Court, as well as his competency and experience, are referred to in the Motion. These considerations do not depend, of course, on any determination of whether appellant is correct in the constitutional arguments he has made in this case. As indicated in the Motion, a brief as well as the statements of the necessary sponsors could accompany the Admission Application for which permission is sought in that Motion. In addition, that Motion and any other materials could be presented in whatever form this Court may consider appropriate.

all rights to The Declaration of Independence. And the organized bar seems intent upon eliminating from the profession those who hold that the Constitution is something to be taken seriously. With such attitudes appellant cannot agree; and if unthinking agreement is required of a member of the bar, then he confesses his ineligibility.

But the basic problem has yet to be stated, and that is whether there is protection in our society for one who, however clumsily and imprudently, would "honestly strive against the many lawless and unrighteous deeds which are done in a state." That is to say, it remains to be seen whether we can so act under our Constitution as to render inapplicable a lesson taught centuries ago,

> For you know well, men of Athens, that if I had actively engaged in the affairs of the state, I would have perished long ago and neither to you would I have been of any use whatever nor to myself. And do not be offended at my telling you the truth: for the truth is, . . . he who will really fight for the right, if he is to be spared even for a while, must act as a private citizen and not in a public capacity.

CONCLUSION.

For the foregoing reasons, relating to both the common good and individual rights, we believe that this Court should reverse its order dismissing this case and thereupon consider this matter upon its merits.

Respectfully submitted,

GEORGE ANASTAPLO,

March 23, 1955 *Appellant, Counsel pro se*

AFFIDAVIT OF COUNSEL.

I hereby depose and say that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court. (See Note 3, above.)

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Counsel pro se

Subscribed and sworn to before me at Chicago, Illinois this 22nd day of March 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO.

In re GEORGE ANASTAPLO

MOTION BY GEORGE ANASTAPLO FOR LEAVE TO FILE AN APPLICATION FOR ADMISSION TO THE BAR OF THE SUPREME COURT OF THE UNITED STATES.

George Anastaplo respectfully moves for leave to file an application for admission to the Bar of the Supreme Court of the United States even though he cannot produce the required certificate from the presiding judge or clerk of the highest court of his State evidencing the fact that he has been for at least three years a member of the bar of that court. He is prepared, however, to provide this Court with materials relating to the purpose of the requirements set forth in Rule 5 and to indicate why such an alternative course of action should be permitted in his case.

Appellant has before this Court at this time litigation respecting his admission to the bar of the Supreme Court

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of Illinois.* Although this Motion is submitted independently of that litigation, reference is made to that litigation since there are connected with it circumstances fresh in this Court's mind which are related to the purposes of this Motion. Various materials that have been filed with this Court should indicate that appellant is fully qualified to serve as a member of the Bar of this Court. That is, whether or not he is deemed correct in the constitutional position he has taken, there is ample evidence (which he is prepared to supplement) as to his character and fitness to practice law. (No real doubt, aside from the effect of differences of opinion about certain theoretical matters, is expressed with respect to these qualifications even by the authorities who have denied him admission in Illinois.) Appellant is also prepared to hold himself open to whatever further examination this Court may wish to administer.

In addition to materials relating to character and fitness, this Court already has before it various indications of the competency and experience which the three-year requirement (Rule 5) is apparently designed to insure. Ap-

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* **In re George Anastaplo,** 3 Ill. 2d 471, 121 N.E. 2d 826; U. S. Supreme Court Docket No. 532; review denied, February 28, 1955, 23 Law Week 3209. The references here are to those documents which have been submitted to this Court in connection with the pending matter. Some reference is made in the Jurisdictional Statement (pp. 39-40) and in Notes 10 and 11 of the Petition for Rehearing (pp. 9-10) to part of the rationale of this particular motion. (The term, "appellant", is taken from the pending matter so that terminology may be uniform throughout. For the further convenience of this Court, this Motion is included in the Appendix to the Petition for Rehearing.)

Appellant is willing to submit a brief exploring more fully than do the Petition for Rehearing and this Motion the rationale of this Motion. He is also prepared to provide the necessary sponsors for admission to the bar and to present this Motion and any other materials in whatever form this Court may indicate is appropriate.

pellant has satisfactorily completed legal studies at a reputable law school (R. 6, 66) and has passed the written bar examination in Illinois (R. 4). In addition, he has for several years now personally conducted a protracted litigation and prepared all materials relating to that litigation, including the Jurisdictional Statement submitted to this Court earlier this term. These various documents, as well as the Record in this matter, should satisfy what is probably the purpose of the three-year requirement in this respect. Here, too, supplementary material could readily be made available.

This Motion is being made in the belief that extraordinary situations warrant extraordinary remedies, so much so that the rules of this Court should be waived accordingly whenever this Court can do justice without disappointing the reasonable expectations of any party. If, appellant's arguments notwithstanding, it has seemed to this Court that it should not directly intervene in the management by a state of its bar matters, no matter what this Court may think of the wisdom of the state action, this Motion is designed to provide an opportunity for this Court to protect to a limited extent the rights of a particular individual. Furthermore, it is believed that this Motion also suggests how this Court can act to protect itself to some extent against any arbitrary standards and conduct of the states which supply the members of the Bar of this Court. (Jurisdictional Statement, pp. 39-40)

Action of the kind requested by this Motion would seem particularly appropriate in a situation such as this where an individual who has been denied admission to a state bar under unprecedented circumstances has demonstrated his overall qualification for the practice of law.

Respectfully submitted,

GEORGE ANASTAPLO,

Counsel pro se

March 23, 1955